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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 2171 Misc.

LOUIS TEPLITSKY,

Petitioner,

—against—

ASSOCIATED PRESS, UNITED PRESS INTERNATIONAL, NEW YORK TIMES, NEW YORK POST, NEW YORK DAILY NEWS, COLUMBIA BROADCASTING SYSTEM, AMERICAN BROADCASTING SYSTEM, NATIONAL BROADCASTING SYSTEM,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT THE NEW YORK TIMES COMPANY IN OPPOSITION

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May, 1970

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Other Authorities:

U.S. CONST., amend. I 2, 7, 8, 9

F. THAYER, LEGAL CONTROL OF THE PRESS, 84 (4th ed. 1962) 8

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Opinions Below

The opinion of the District Court (Ex. A to this Brief), filed February 3, 1970 is not reported, nor is the decision of the Court of Appeals for the Second Circuit (Ex. B to this Brief), dated March 12, 1970.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Question Presented

Whether petitioner has a First Amendment right to compel the respondent The New York Times Company to report and publish articles concerning petitioner's picketing activities by which he seeks to publicize an alleged claim or grievance against the United States.

Both the District Court and the Court of Appeals held that petitioner's claim against respondent The New York Times Company in this action was "frivolous."

Constitutional Provision Involved

Amendment I to the Constitution of the United States provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

Statement

This Brief is submitted on behalf of respondent The New York Times Company ("The Times") (sued as "New York Times") in opposition to petitioner's petition for a writ of certiorari.

This litigation concerns the claim by petitioner that he has a constitutional right under the First Amendment to compel The Times (and various other news media) to re-

port and publish articles about his picketing activities which he conducted in order to publicize an alleged claim against the United States.

The complaint herein alleged (i) that the petitioner (who is appearing pro se) had a claim or grievance against the United States; (ii) that in a separate action which he commenced in the United States District Court for the Southern District of New York asserting such claim against the government the Court dismissed his complaint; (iii) that to protest the action of the Court he conducted one-man public protest demonstrations by picketing in front of the United States Court House, Foley Square, New York City, on September 10, 1969 and in front of the White House, Washington, D. C., on September 15, 1969; (iv) that certain of the defendants (including The Times) were notified in advance of his intention to hold such demonstrations; (v) that none of the defendants reported such demonstrations in their publications or broadcasts; and (vi) that by reason of the failure to report his activities he was aggrieved.

Petitioner demanded money damages from each of the defendants, including $25,000 damages of The Times, and also asked the Court:

> "One—To declare that the news media by intentionally not making the said two public Protest Demonstrations known to the American people, had violated the 1st amendment of the Bill of Rights and thereby had denied me, the plaintiff, the grievance petition intended for the sole benefit and enlightenment of the people of America, U. S. Congress, the Judicial Branch of the Government and the President of the United States.
>
> "Two—to order the news media to implement and to correct the said violations."

The Times and all the other defendants moved to dismiss the complaint for failure to state a claim upon which relief could be granted. On February 3, 1970, the Hon. Lloyd F. MacMahon of the United States District Court for the Southern District of New York ordered the complaint dismissed. In his memorandum opinion filed on that date Judge MacMahon held:

> "There is . . . no recognized First Amendment right to coverage by the news media, and if we were to enforce such a right it would certainly constitute a violation of the freedom of the press. . . .
>
> "This court is powerless to grant this unfortunate man the help be obviously needs. An examination of plaintiff's papers shows that his claim is patently frivolous and fanciful."

Petitioner then filed a notice of appeal from this decision.

On February 13, 1970, an order of Judge MacMahon of that date was entered which held the appeal "totally frivolous," and which certified "pursuant to 28 U.S.C. §1915(a), and Rule 24, Federal Rules of Appellate Procedure, that the appeal is not taken in good faith," and denied petitioner's application to appeal *in forma pauperis*. (Petitioner had received permission to proceed in the District Court *in forma pauperis* per order of Judge Sugarman filed November 13, 1969.)

On February 13, 1970, petitioner served a "Motion and Affidavit to Nullify or Amend" the judgment of the District Court, which was heard in the Court of Appeals for the Second Circuit on March 9, 1970. Petitioner also moved for leave to proceed *in forma pauperis*.

On March 12, 1970, the Court of Appeals (Smith, Hays and Kaufman, *JJ.*) dismissed petitioner's "appeal . . . for frivolousness" and denied his motion to proceed *in forma pauperis.*

It might be useful to point out that the petitioner's claim against the government—the resolution of which caused him to embark on his picketing activities which gave rise to the instant action, was the subject of separate litigation commencing in 1967. The petitioner's separate action against the government, *Teplitsky* v. *Bureau of Compensation, U. S. Dept. of Labor,* 288 F. Supp. 310 (S.D.N.Y.), *modified and aff'd,* 398 F.2d 820 (2d Cir. 1968), *cert. denied* 393 U.S. 943 (1968) and 396 U.S. 863 (1969) was described as follows in the Per Curiam opinion of the Second Circuit (Friendly, Smith and Kaufman, *JJ.*) (398 F.2d at 821):

> "Teplitsky in 1963 was receiving veteran's benefits of $107.00 per month on a 50% disability rating due to service-connected nervous disorder. In December 1963, while temporarily employed in the Post Office, he suffered a groin injury. After a series of administrative proceedings and various ratings, he was eventually rated 100% disabled both by the Bureau of Compensation and Veterans Administration, and required to make an election between F.E.C.A. benefits of $209.99 a month plus the $107.00 a month V.A. award prior to the groin injury, and the $250.00 a month 100% V.A. award. He rejected the tendered check for back F.E.C.A. benefits and brought action attacking the ruling on various grounds and seeking damages in large amounts. The government cross claimed for declaratory judgment requiring him to

elect. On motion, the court granted summary judgment dismissing the complaint and ordering him to make an election."

The opinion then continued: "Essentially for the reasons given in Judge MacMahon's opinion, 288 F. Supp. 310, we affirm . . . [his] order dismissing the complaint." As indicated above, this Court twice denied petitioner herein a writ of certiorari in his action against the government. Less than a week after he granted the motion of The Times and the other respondents herein to dismiss petitioner's complaint in the instant action, Judge MacMahon also denied petitioner's motion in his separate action against the government to relieve him of the earlier judgment dismissing that action.

It is evidently the desire to protest the disposition of his litigation against the government that caused the petitioner to conduct his picketing activities. It is the failure of The Times and the other respondents to publish news articles or broadcasts concerning these activities which gave rise to the instant action. Petitioner now seeks in his petition to assert a new claim, that his rights were infringed by the failure of the defendant news media to publish reports concerning certain "hunger strikes" which he voluntarily conducted to dramatize his claim against the Government. This new claim is not properly before the Court herein, since the complaint did not raise it, and the courts below did not pass upon it. However, the new claim does not differ in theory from the one which was raised by the complaint—that the petitioner has a right to compel The Times to publish whatever stories concerning him that he wishes.

Argument

The petitioner's claim is completely frivolous and his petition clearly presents no grounds for the granting of certiorari.

I.

The decision below was clearly correct.

The Times is a corporation engaged in publishing the daily newspaper of general circulation entitled "The New York Times" which is prepared in and distributed from facilities in New York City. The essence of the petitioner's alleged grievance against The Times, as stated in the complaint, is that it failed to carry a news story concerning his protest demonstrations at the United States Court House, New York City and at the White House, which he alleges that he carried out by himself by picketing with "3 placards" containing "29 slogans" and "211 words." The petitioner claims that he has a right under the First Amendment to the Constitution to have his activities publicized by The Times in its newspaper.

Decisions as to what news stories should or should not be printed in The Times clearly are and must be decisions to be made by The Times itself. It is equally clear that no newspaper could function if the contents of its publications could be determined by individual members of the public who asserted an absolute right to have their stories printed. A plainer interference with freedom of the press would be hard to imagine.

The District Court correctly held that the petitioner clearly had no First Amendment claim whereas to sustain his claim would infringe the First Amendment rights of the defendants. The Court of Appeals correctly dismissed the appeal from this decision. This result is supported by F. THAYER, LEGAL CONTROL OF THE PRESS, 84 (4th ed. 1962) in which the author enunciates "the right [of a publisher] to print what he pleases." An interesting case cited by the District Court in support of its decision is *Avins* v. *Rutgers, State Univ. of New Jersey*, 385 F.2d 151 (3d Cir. 1967), *cert. denied* 390 U.S. 920 (1968). Avins had submitted an article to the Rutgers Law Review for publication. The editors rejected the article. Avins sued, alleging *inter alia* that the rejection violated his freedom of speech. The District Court disagreed, granting the defendant's motion for summary judgment. The Court of Appeals affirmed. The opinion of the Court by Judge Maris held (385 F.2d at 153): "The right to freedom of speech does not open every avenue to one who desires to use a particular outlet for expression." *A fortiori*, the complaint herein did not state a cognizable claim of infringement of the plaintiff's First Amendment rights.

Patently, the allegations of the complaint did not state a claim upon which relief can be granted. Both the District Court and Court of Appeals correctly held petitioner's claim herein to be frivolous. Neither The Times nor any of the other defendants have interfered with his freedom of speech by not publicly reporting the petitioner's activities. Indeed, this is demonstrated by the complaint itself, for the petitioner alleged that he did in fact conduct his public protests without interference. Moreover, he alleged that his protests elicited the interest of a number of individuals.

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There was, therefore, manifestly no interference by The Times with petitioner's First Amendment rights nor did he allege any other actionable conduct.

It is thus plain that the decision of the Courts below that the complaint failed to state a claim upon which relief can be granted is correct.

II.

There is no conflict of decision.

The petition does not point up any conflict of decision and it is submitted that there are no authorities which support his contention, that an individual member of the public can compel a newspaper to publish news articles concerning such activities of his as he may personally desire to have circulated.

III.

There is no important question of federal law.

The claim of petitioner is not only unimportant, it is frivolous, as both the District Court and the Court of Appeals correctly held. Undoubtedly the petitioner is sincere in his cause and the importance of it to him is great; but his case is singularly unimportant as a matter of federal law.

Petitioner's unfortunate attempts in his petition to elevate his case to legal significance by threatening suicide through self-starvation would surely evoke the compassion of any right-thinking person. However, it is submitted that the Court should agree with the District Court and the

Court of Appeals, which were presented with material of the same nature, that there is no legal significance or substance to petitioner's case. Rather, the petition amply demonstrates, as Judge MacMahon of the District Court stated in his decision dismissing the complaint, that:

> "This court is powerless to grant this unfortunate man the help he obviously needs. An examination of plaintiff's papers shows that his claim is patently frivolous and fanciful."

The petitioner plainly therefore has presented no claim of any federal or other legal importance.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent
The New York Times Company

LOUIS M. LOEB
EDWIN R. ALLEY
LORD, DAY & LORD
Of Counsel

Dated: New York, New York
May, 1970

EXHIBIT A

Opinion of the United States District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

69 Civ. 5007

LOUIS TEPLITSKY,

Plaintiff,

—against—

ASSOCIATED PRESS, UNITED PRESS INTERNATIONAL, NEW YORK TIMES, NEW YORK POST, NEW YORK DAILY NEWS, COLUMBIA BROADCASTING SYSTEM, AMERICAN BROADCASTING SYSTEM, NATIONAL BROADCASTING SYSTEM,

Defendants.

MACMAHON, *District Judge*:

Plaintiff alleges a conspiracy between the corporate defendants and the federal government to deprive him of his First Amendment right to petition the government by not publicizing his one-man demonstration protests outside this courthouse and in front of the White House.

Defendants, represented by an array of talent, support their motions to dismiss this frivolous action with ponderous and scholarly memoranda of law which have been of great help to the court.

There is, to be sure, no recognized First Amendment right to coverage by the news media, and if we were to

enforce such a right it would certainly constitute a violation of freedom of the press. See, *Avins* v. *Rutgers, State University of New Jersey,* 385 F.2d 151 (3d Cir. 1967), *cert. denied,* 390 U.S. 920 (1968).

This court is powerless to grant this unfortunate man the help he obviously needs. An examination of plaintiff's papers shows that his claim is patently frivolous and fanciful.

Accordingly, defendants' motions to dismiss are in all respects granted. The Clerk of the court is hereby directed to enter judgment dismissing plaintiff's complaint.

So ordered. No further order is necessary.

Dated: New York, N. Y.
February 3, 1970

LLOYD F. MACMAHON
United States District Judge

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EXHIBIT B

Decision of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twelfth day of March, one thousand nine hundred and seventy.

LOUIS TEPLITSKY,

Petitioner-Appellant,

—v.—

ASSOCIATED PRESS, UNITED PRESS INTERNATIONAL, NEW YORK TIMES, NEW YORK POST, NEW YORK DAILY NEWS, COLUMBIA BROADCASTING SYSTEM, AMERICAN BROADCASTING SYSTEM, NATIONAL BROADCASTING SYSTEM,

Defendants-Appellees.

It is hereby ordered that the motion made herein by counsel for the appellee News Syndicate Co., Inc., sued herein as New York Daily News, by notice of motion dated February 20, 1970 to dismiss the appeal from the United States District Court for the Southern District of New York for frivolousness be and it hereby is granted

It is further ordered that motion to proceed *in forma pauperis* is denied.

J. JOSEPH SMITH
IRVING R. KAUFMAN
PAUL R. HAYS
Circuit Judges